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No. 08-259

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRANSLOGIC TECHNOLOGY, INC.,

Petitioner,

v.

HITACHI, LTD., HITACHI AMERICA, LTD., and RENESAS TECHNOLOGY AMERICA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Circuit Court of Appeals impaired any party's rights under the Seventh Amendment when, in an unpublished decision, it reversed a jury verdict after undertaking claim construction in the manner specified by well-established and unchallenged precedent, and then concluded as a matter of law that the patent was invalid for obviousness?

2. Whether, after holding in a precedential opinion that the claims in the asserted patent were obvious under 35 U.S.C. § 103(a), the Federal Circuit properly reversed a District Court judgment in a companion case by relying on the reasoning and result of the precedential opinion concerning the same patent?

3. Whether Petitioner can properly raise a question relating to the composition of the Board of Patent Appeals and Interferences in this case, when it never raised the issue below and when this Court has denied *certiorari* in a companion case directly presenting the issue?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel of record for respondents Hitachi, Ltd., Hitachi America, Ltd., and Renesas Technology America, Inc. (collectively "Hitachi") represents that Hitachi, Ltd. is a publicly-traded corporation with no parent and no other publicly-traded corporation owning more than 10% or more of its stock. Hitachi America, Ltd. is a wholly-owned subsidiary of Hitachi, Ltd. Renesas Technology America, Inc. is a wholly-owned subsidiary of Renesas Technology Corp. Hitachi, Ltd. and Mitsubishi Electric Corporation each own more than 10% of the stock of Renesas Technology Corp. No other publicly-traded company owns 10% or more of its stock.

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JURISDICTION AND STATUTORY PROVISIONS INVOLVED

Respondents agree with Petitioner's statement regarding jurisdiction.

This case is a companion to *Translogic Technology, Inc. v. Dudas*, No. 07-1303 (the "Re-exam Case" or "*Dudas*"). Petitioner sought review by this Court of the Federal Circuit's decision in *Dudas* on the basis that one of the three Administrative Patent Judges who participated in the re-examination proceedings that found the patent invalid had not been appointed properly. *See* Petition for a Writ of *Certiorari* ("Petition") at 25-27. On October 6, 2008, this Court denied that petition in *Translogic Technology, Inc. v. Dudas*, 77 U.S.L.W. 3196 (2008). Moreover, Congress has enacted legislation that addresses and resolves Petitioner's concerns about the appointment of Administrative Patent Judges. Act of Aug. 12, 2008, Pub. L. No. 110-313, 122 Stat. 3015 (2008). Therefore, that portion of the current petition is now moot. In any event, Petitioner never raised below *in this case* any issue relating to the appointment of Administrative Patent Judges.

Respondents do not agree that the United States Constitution, art. II, § 2, cl. 2, is properly involved in this petition because Petitioner did not previously raise any issues arising under this clause in the appeal proceedings in this case. Respondents do not agree that Section 307(a) of Title 35, United States Code is properly involved in this petition, because that provision was not relied upon by the Federal Circuit as a basis for its decision bin this case.

STATEMENT OF THE CASE

A. Summary Of Argument

There is no reason for this Court to review the unpublished ruling of the court below, for it does not raise or resolve any novel or important issues of law. Rather, the Court of Appeals for the Federal Circuit relied on its own precedential opinion, applied its standard processes to interpret the claims of a patent, and concluded the patent was invalid for obviousness. Petitioner does not challenge the Federal Circuit's claim construction. Nor does Petitioner challenge the Federal Circuit's determination that the claims of U.S. Patent No. 5,162,666 (the "'666 Patent" or the "asserted patent") were obvious and the patent invalid.

Petitioner was not deprived of any right to a jury trial under the Seventh Amendment by this appellate process. The Federal Circuit reversed the judgment of the District Court because the lower court made an error of law in its claim construction and a further error of law in determining that the asserted patent was not obvious. These errors of law were corrected on appeal by reversing the judgment. No constitutional issues were implicated in this garden-variety appellate review.

Petitioner's arguments regarding the Appointments Clause are not properly raised here, for they were never presented at any time, to any court, below. Moreover, they are moot, as this Court declined to address them in a companion case where the issue was presented directly and new legislation has cured any possible concern.

No aspect of this case is new, novel or precedential warranting review by the Supreme Court.

B. Procedural History

The '666 Patent was issued in November, 1992. It claims a well-known type of logic circuit called a "multiplexer." Translogic tried to develop its own products based upon this logic circuit, or license its technology to others, but with little success. In 1999, Translogic asserted the patent against Hitachi in a lawsuit filed in the District of Oregon. *Translogic Technology, Inc. v. Hitachi, Ltd., et. al.*, Civ. No. 99-407-PA (D. Or.) ("*Hitachi*"). The lawsuit alleged that certain microprocessors sold in the United States included within their millions of circuits the multiplexer logic claimed in the '666 Patent.

Between 1999 and 2002, while the lawsuit was pending, five reexaminations of the '666 Patent were initiated in the Patent and Trademark Office ("PTO"), and merged together. *See* Pet. App. at 135a-136a. After reviewing the prior art, the PTO examiner rejected all remaining claims in the '666 Patent as obvious. That final rejection occurred on March 8, 2004, before any final judgment was entered by the District Court in the *Hitachi* case. Translogic appealed to the PTO Board of Patent Appeals and Interferences ("Board").

Meanwhile, the federal court litigation proceeded in a bifurcated fashion. In October, 2003, a jury, precluded from learning about the re-examination results, concluded Hitachi had not proven invalidity by clear and convincing evidence. *See* Pet. App. at 136a.

On February 22, 2005, the District Court rejected the recommendation of its own special master and entered summary judgment of infringement of claims 16 and 17 of the patent. *Id.* at 136a-137a. On May 6, 2005, a jury awarded damages to Translogic of $86.5 million. *Id.* at 137a. Importantly, however, no final judgment was entered by the trial court at that time.

On July 14, 2005, the Board, in a lengthy and thorough opinion, unanimously affirmed the examiner's conclusion that all claims of the '666 Patent were invalid. *Id.* at 182a-265a. Translogic sought a rehearing before the Board, which was unanimously denied with another lengthy opinion. *Id.* at 161a-181a. Translogic then appealed the Board's decision to the Federal Circuit.

In light of the Board's claim construction and determination of unpatentability, and since final judgment had not been entered, Hitachi filed a Motion for Reconsideration of the District Court's prior rulings regarding claim construction, anticipation, and obviousness. The District Court, acknowledging that it and the Board had reached different conclusions regarding the meaning of key terms in the '666 Patent, denied Hitachi's motion. The District Court declared that the Federal Circuit would be required to act as the final arbiter of the meaning of the patent: "The Federal Circuit is the proper forum to resolve conflicts between this court's claim construction and the Board's claim construction." *Id.* at 28a.

On December 13, 2005, almost six months *after* the Board unanimously found the '666 Patent obvious and all of its claims unpatentable, judgment was entered

against Hitachi. *Id.* at 36a-39a. Respondents appealed to the Federal Circuit. The Federal Circuit assigned both the *Hitachi* appeal and the appeal from the Board decision (the *Dudas* appeal) to the same panel in order to ensure consistent treatment of the '666 Patent. *Id.* at 137a.

Claim construction was crucial to the ultimate question of law in both appeals — whether the asserted claims of the '666 Patent were obvious and hence unpatentable and invalid.[1] In its published opinion in the *Dudas* appeal, the Federal Circuit, following its well-established precedent in *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448, 1456 (Fed. Cir. 1998), and *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996), reviewed the Board's claim construction *de novo* and "without deference." *In re Translogic Technology, Inc.*, 504 F.3d 1249, 1256 (Fed. Cir. 2007); Pet. App. at 146a. In that opinion, the Federal Circuit explicitly considered the relevant claim construction adopted by the District

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1. A key phrase in dispute was "coupled to receive." This term refers to the manner in which portions of the electrical circuit claimed in the patent were connected to surrounding wiring. If the term means the circuit is "capable of receiving" particular types of signals then the patent is invalid as obvious, because many prior art circuits also were capable of being connected in the same manner. The Board unanimously concluded that "coupled to receive" means a terminal "capable of receiving a control signal. The control signal itself is not part of the claimed structure." Pet. App. at 192a-193a; *see also id.* at 195a. The Board then concluded the claims of the patent were obvious and invalid. *Id.* at 201a-265a. The District Court reached the opposite conclusion. *Id.* at 33a-34a.

Court in this case. 504 F.3d at 1257; Pet. App. at 148a. With both interpretations before it, and using its standard claim construction tools, the Federal Circuit concluded that the Board's claim construction was correct and the District Court's construction was wrong. 504 F.3d at 1257-58; Pet. App. at 150a-151a.

Using the proper claim construction, the Federal Circuit then applied this Court's decision in *KSR International Co. v. Teleflex Inc.*, 550 U.S. __, 127 S. Ct. 1727 (2007), to determine whether the '666 Patent was invalid as obvious. After a careful review, the Federal Circuit, affirming the Board, unanimously concluded all claims were obvious so "the '666 patent [is] unpatentable." 504 F.3d at 1258-62; Pet App. at 151a-160a. Simultaneously, in an unpublished decision, the Federal Circuit adopted its reasoning in the precedential opinion in *Dudas* and reversed the verdict entered against the defendants in the *Hitachi* case since it had concluded "the claims of the '666 patent are obvious under 35 U.S.C. § 103(a)." Pet. App. at 3a-5a.

REASONS FOR DENYING THE PETITION

The Federal Circuit's conclusion that the '666 Patent is invalid as obvious is unremarkable and not worth review by this Court. Indeed, Petitioner does not challenge that decision. Rather, it only argues that the judgment it obtained on the jury verdict at trial should not have been reversed, even though both the Board and the Federal Circuit have concluded that the patent on which the verdict and judgment were based is invalid. Essentially, the rule for which Translogic argues would preclude any reversal by a court of appeals of a legally erroneous district court judgment.

A. Petitioner Was Not Denied Any Rights Under The Seventh Amendment

Translogic argues incorrectly that the Seventh Amendment right to a jury trial prohibits the Federal Circuit from concluding that the claims of a patent are obvious in a district court appeal when it has reached the same conclusion in a re-exam appeal. This argument is wrong, has been rejected repeatedly, and is not a matter in controversy among courts requiring resolution by this Court.

Obviousness is a question of law for the court. *KSR International Co. v. Teleflex, Inc.*, __ U.S. __, 127 S. Ct. 1727, 1745 (2007) ("The ultimate judgment of obviousness is a legal determination."); *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) ("the ultimate question of patent validity is one of law"); *Medtronic, Inc. v.*

Intermedics, Inc., 799 F.2d 734, 738 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) ("Obviousness is a question of law."). This is true even in a jury trial. *Structured Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 718-19 (Fed. Cir. 1984) (introduction of jury does not change nature of obviousness question, which "continues to be a legal decision for the court").

Claim construction is the essential first step in any invalidity analysis. *Hilgraeve Crop. v. Symantec Corp.*, 265 F.3d 1336, 1341 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 906 (2002); *Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 796 (Fed. Cir. 1990). Like obviousness, claim construction also is a purely legal issue for the court that is subject to *de novo* review on appeal. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (claim construction is a matter for the court, not the jury); *Cyber Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448, 1451 (Fed. Cir. 1998) (en banc) ("claim construction, as a purely legal issue, is subject to de novo review on appeal"); *see, Phillips v. AWH Corporation*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1170 (2006) (addressing claim construction issues *de novo*). Here, the Federal Circuit properly made the ultimate determination of claim construction and validity, after considering all prior interpretations of the claims of the '666 Patent. Translogic does *not* ask this Court to review that claim construction.

There is no Seventh Amendment right to a jury trial when the court is deciding an issue of law. 8 Moore's Federal Practice § 38.12[2][a] (Matthew Bender, 3d Ed.

2008). And it is well-settled that when, as here, the court of appeals has decided a verdict was erroneous as a matter of law, it may enter judgment for the other party without violating the Seventh Amendment. *Weisgram v. Marley Co.*, 528 U.S. 440, 449-50 (2000); *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 322 (1967).

Translogic's Seventh Amendment argument is based on the false premise that the jury found the patent "valid" and that this determination cannot be altered on appeal. "Courts, however, do not find patents 'valid,' but rather only that the patent challenger did not carry the 'burden of establishing invalidity in the particular case before the court' under 35 U.S.C. § 282." *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1429 n.3 (Fed. Cir. 1988); *accord, Shelcore, Inc. v. Durham Industries, Inc.*, 745 F.2d 621, 627 (Fed. Cir. 1984) ("A patent is not held valid for all purposes but, rather, not invalid on the record before the court."). In this case, the jury — unaware of the pending re-examination or the PTO examiner's determination that the '666 Patent was invalid — merely determined that Hitachi had not met its burden of proving that the claims, as construed by the District Court, were invalid. In any event, the question of invalidity by reason of obviousness is a question of law for the court, not a question of fact for the jury. Because the District Court's claim construction was wrong as a matter of law, its legal determination of the question of obviousness likewise was wrong.

Applying the proper claim construction, the '666 Patent is, as a matter of law, invalid as obvious. Consequently, the Federal Circuit properly ordered that the claims against the *Hitachi* defendants should be dismissed.[2] By doing so, it did not deprive Translogic of the right to a jury trial, but simply corrected the District Court's legal error.

Similarly, an administrative proceeding in the Patent Office — a re-examination — does not violate a patentee's right to a jury trial regarding validity, even if the re-examination results in the total loss of a patent. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604-05 (Fed. Cir. 1985). A patent is a "public right," conferred by the federal government. As such, it can be taken away by the government. If the Patent Office determines, during

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2. Petitioner argues that the Federal Circuit implicitly reviewed and resolved factual disputes regarding the scope of the prior art, what was disclosed in the art, and what would have been known by a person of ordinary skill in the art. Pet. at 14. However, Translogic does not dispute that *Gorai* — the key prior art reference — was cited at trial in this case, was published before the filing date of the '666 Patent and discloses two-input multiplexers connected in series. Pet. at 15; Pet. App. at 155a-156a.

Petitioner also argues that Hitachi relied on prior art other than *Weste* at trial to show it was obvious to use "transmission gate multiplexers (TGMs)" in the multiplexer assemblies. Pet. at 14-15. Notably, however, Translogic does *not* assert that TGMs were not obvious for use in the circuit. They were well-known in the art. Pet. App. at 158a-159a, 208a, 241a. Indeed, TGMs are specifically admitted to be prior art in Figure 1 of the '666 Patent. Resp. App. at 2. Thus, there were no *genuine* factual disputes about the scope or content of the prior art.

re-examination, that it erroneously issued the patent, then it can "remove patents that should never have been granted," "even against the will of the patent owner," without the need for a jury trial. *Id.* at 604; *accord, Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228-29 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 829 (1992) (re-examination that results in canceling of claims does not deprive patent owner of Seventh Amendment right to a jury trial).

Petitioner asserts that the peculiar procedural posture of this case is likely to recur, and therefore should be of interest to this Court. Pet. at 16-19. That is highly unlikely. Here, *before* a final judgment was entered in the court proceeding, the PTO Board already had unanimously concluded that the patent-in-suit should never have issued. Even so, the District Court refused to set aside the verdict and declared, instead, that the Federal Circuit was "the proper forum to resolve conflicts between this court's claim construction and the Board's claim construction." Pet. App. at 28a. The Federal Circuit did exactly that, and concluded the District Court was wrong as a matter of law. Consequently, it reversed the judgment. Pet. App. at 1a-5a. The alternative result as urged by Translogic — allowing a multimillion dollar infringement judgment to stand after the PTO and the Federal Circuit both had concluded the patent was invalid and should never have issued in the first place — would be inappropriate and unjust; indeed, it would eviscerate the entire appellate process.

B. Petitioner Has Not Been Retroactively Deprived Of Any Vested Private Property Right

Translogic also argues, again incorrectly, that the Federal Circuit erroneously interpreted the Re-examination Statute, 35 U.S.C. §§ 301-307, to allow "retroactive application" of a certificate of cancellation. Pet. at 23. That is not what occurred. Rather, the Federal Circuit applied its own precedential decision in the companion *Dudas* case to conclude that the '666 Patent was invalid as obvious, and proceeded accordingly. This is not retroactive application of any law, statute or administrative decision. Rather, it is simply the normal outcome of a direct appeal in which the appellant prevails. There was no reliance upon, or retroactive application of, the cancellation of the '666 Patent in the re-examination proceedings.[3] Indeed, the Federal Circuit's opinion in this case did not refer at all to the actual or prospective issuance of a re-examination certificate, but instead relied on the same panel's legal analysis as set forth in its precedential opinion dealing with the very same patent.

Moreover, Petitioner is wrong about the law. It appears to argue both that the Re-examination Statute cannot be retroactive, *see* Pet. at 22 ("35 U.S.C. § 307 is prospective in application only"), and that the Federal Circuit impermissibly applied the statute retroactively to deprive Translogic of a vested right in the jury's verdict in this case, *see* Pet. at 20-21. Translogic cannot argue that the Re-examination Statute was applied "retroactively" to the '666 Patent, since the statute

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3. The '666 Patent has not yet been cancelled.

existed for more than a decade before the '666 Patent was issued.[4] Nor can it raise that issue here, since it did not raise it in the direct appeal from the Board's decision.

Petitioner's argument that the Federal Circuit acted improperly here by retroactively applying the cancellation of the '666 Patent to vacate an existing judgment of validity and infringement (Pet. at 21), is factually wrong and legally flawed. As discussed above, the Federal Circuit's opinion in this case makes no reference at all to the actual or prospective cancellation of the '666 Patent by the PTO. Petitioner's argument mischaracterizes the factual basis for the Federal Circuit's decision, presumably to make the issues in this case appear more significant than they actually are.

No new or important legal issue is presented by this case. It is well-established that judicial decisions operate retrospectively. *See Rivers v. Roadway Express*, 511 U.S. 298, 311 (1994). While newly-passed statutes that "tak[e] away or impair[] vested rights acquired under existing laws" usually apply only prospectively,

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4. In the *Patlex* case referenced above, the Federal Circuit addressed the constitutional propriety of retroactive application of the Re-examination Statute to patents that were granted before enactment of the statute. Appellants there argued that the retroactive scope of re-examination deprived them, *inter alia*, of their rights under the Due Process Clause of the Fifth Amendment and the Seventh Amendment right to jury trial. The Federal Circuit rejected these arguments on the grounds, as noted above, that a patent confers a public right, and therefore the Congressional purpose in enacting the Re-examination Statute – to permit the government to correct its own mistake if it concludes that a patent was granted in error – was valid and "carrie[d] no insult" to the Constitution. 758 F.2d at 604.

Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006) (citation omitted), that rule has no bearing on this case, which does not involve any change in the patent statutes.[5]

Petitioner begins from an incorrect premise: that it had a vested right in a final judgment that was taken from it. But rights in a judgment do not vest until all appeals are concluded and "there is a *final, unreviewable judgment*." *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (emphasis added); *see also*, *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("a legal claim affords no definite or enforceable property right until reduced to final judgment"); *Grimesy v. Huff*, 876 F.2d 738, 743 (9th Cir. 1989) *cert. denied*, 499 U.S. 975 (1991) (plaintiffs' right to damages had not "matured or become unconditional" where judgment was still subject to review); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *In re Tamoxifen Citrate Antitrust Litigation*, 277

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5. Translogic cites and discusses cases in which this Court addressed the retroactive application of *legislation*, not judicial decisions. For example, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court addressed the question whether certain provisions of the 1991 Civil Rights Act should be applied to Title VII cases that were pending when the Act took effect. The Court held that retroactive application of the new statutory provisions would be improper because "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Id.* at 265 (citation omitted). However, *Landgraf* itself recognized the "firm rule of retroactivity," that a new rule announced in a judicial decision applies to pending cases. *Landgraf*, 511 U.S. at 278 & n.32.

F. Supp. 2d 121, 138 (E.D.N.Y. 2003), *aff'd*, 429 F.3d 370 (2d Cir. 2005) (no vested right in judgment still on appeal).[6] This Court has specifically stated that judicial decisions apply to all pending cases:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect *in all cases still open on direct review* and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993) (emphasis added).

The District Court judgment here was immediately appealed, and still is not final. Indeed, if it were, Translogic could not petition this Court for a writ of *certiorari*. Thus, Petitioner has no vested right in the jury's verdict and the Federal Circuit did not retroactively deprive it of a private property right. Rather, the Court of Appeals found (as the Board found before it) that the claims in Translogic's patent were obvious as a matter of law, so the patent was invalid. Consequently, the District Court's decision based on those claims — the same decision this Court is now asked to review — could not stand. There is nothing unusual or improper about the Federal Circuit's disposition.

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6. Indeed, Justice Stevens has questioned whether a party has an "inviolable 'vested right'" even in a final judgment, "[g]iven the existence of statutes and rules, such as Rule 60(b), that allow courts to reopen apparently 'final' judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 247 n.2 (1995) (Stevens, J., dissenting).

C. Petitioner's Challenge To The Makeup Of The Board Is Moot

Finally, Petitioner argues, again, that one of the three PTO patent judges that rejected the '666 Patent was appointed in violation of the Constitution and, therefore, the Board's decision must be vacated. Pet. at 26. This argument is moot, for two reasons. First, this Court has already rejected Translogic's Petition for *Certiorari* in the underlying *Dudas* case. Although Translogic urges this Court to grant the instant petition anyway (Pet. at 27), it offers no reason why the Court should review the issue in this case when it has already declined to do so in the Re-exam Case itself.

Second, Congress has recently enacted legislation to resolve the (purported) Appointments Clause violation of which Petitioner complains. Certainly there is no "compelling reason" to grant a writ of *certiorari* on this issue when it has already been resolved through legislation. *See* S. Ct. Rule 10.

Moreover, this issue was not previously raised in the present case. As demonstrated in response to Translogic's petition for *certiorari* in the companion case, it did not raise or properly preserve this issue in its direct appeal from the Board's decision finding the '666 Patent was unpatentable. *See* Intervenors' Brief in Opposition to Petition For Writ of *Certiorari*, *Translogic Technology, Inc. v. Dudas*, S. Ct. No. 07-1303 (June 13, 2008), at 7-10; Brief for Appellee Director of The United States Patent and Trademark Office Opposing Panel Rehearing *En Banc*, *In re Translogic Technology, Inc.*, Fed. Cir. No. 2006-1192 (Dec. 27, 2007) at 8-10. It did not even raise the issue in this case. Thus, it cannot be reviewed now.

CONCLUSION

The Federal Circuit's unpublished decision in this case is unremarkable and does not warrant review by this Court. The Federal Circuit applied standard claim construction processes to determine, as a matter of law, that the District Court interpreted the '666 Patent incorrectly. Applying the proper claim interpretation, the Court of Appeals decided, again as a matter of law, that the claims were obvious and the patent invalid. Consequently, it reversed the judgment of the District Court. Nothing here is new, novel or worthy of the attention of this Court.

Respectfully submitted,

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